THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

March 8, 1961

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. WW-1000

Re: Deductibility of the commissions of an executor or an administrator for inheritance tax purposes.

Dear Mr. Calvert:

We quote the following excerpt from your letter requesting our opinion on the above captioned matter.

> "We desire the opinion of your office with respect to the proper handling of claimed deductions for the fees of an executor/administrator for inheritance tax purposes.
>
> "For the past twenty-five years, this department has disallowed fees claimed by an executor or administrator when the executor or administrator was the sole heir or legatee of an estate, because these fees did not pass out of the estate. However, it has been our policy to allow these fees when either the executor or administrator was not an heir or legatee of an estate, because the heirs or legatees received the estate minus the fees of the executor/administrator.
>
> "Since Article 14.10, Chapter 14, Title 122A, does not provide for a deduction of this nature, we wish to be advised whether or not our policy is correct."

The pertinent provisions of Article 14.10, Chapter 14, Title 122A, 20A, Taxation-General, Vernon's Annotated Texas Statutes, are the following:

> "The only deductions permissible under this law are the debts due by the estate, funeral expenses, expenses incident to the last illness of the deceased, which shall

> be due and unpaid at the time of death, all Federal, State, County, and Municipal taxes due at the time of the death of the decedent, attorney's fees and Court costs accruing in connection with the assessing and collecting of the taxes provided for under this Chapter, . . . A full statement of facts authorizing deductions must be made in duplicate under oath by the executor, administrator, or trustee, and one copy filed with the county clerk and the other with the Comptroller, before any deductions will be allowed."

We think that Article 14.09, Ch. 14, Tit. 122A, 20A, Tax.-Gen., V.A.T.S., must also be considered in determining an answer to the question presented. This article reads as follows:

> "If a testator bequeaths or devises to his executor or trustee, property in lieu of commission, the value of such property in excess of reasonable compensation, as determined by the county judge and the Comptroller, shall be subject to taxation under this Chapter."

We recognize at the outset that Article 14.10, formerly Article 7125, Vernon's Annotated Civil Statutes, listing permissible deductions in determining the amount due the State as inheritance taxes is one of limitation and that our courts have so held. Walker v. Mann, 143 S.W.2d 152 (Civ.App. 1940, error ref.). Clearly the fees or commissions of an executor or administrator are not among the enumerated allowable deductions. However, we think that your policy in allowing these fees as a deduction when either the executor or administrator was not an heir or legatee of the estate has been correct. We quote the following excerpt from an annotation in 92 A.L.R. entitled "Deduction of Commissions of Executors, Administrators or Trustees in Computing Succession or Estate Tax" at pages 537, 538:

> "One of the items universally recognized as a proper deduction in the computation of succession and estate taxes is the expense of administering on the estate. Ordinarily, the statute imposing the tax expressly provides for this deduction. Where not expressly provided for--as under some of the earlier New York statutes--the deduction has been

> allowed by the courts upon the ground that the tax is only upon the amount of the assets actually passing to the heir or legatee, and therefore necessarily excludes such of the assets as are used to pay administration expenses.
>
> "That commissions of an executor or administrator are an 'expense of administration' is too obvious to require citation of authority. As said in the reported case (SCOTT V. COMMISSIONER OF INTERNAL REVENUE (C.C.A. 8th) ante, 531): 'Obviously, commissions allowable and paid to executors under the laws of the state of administration are administration expenses.'
>
> "It follows, therefore, that commissions of an executor or administrator must be allowed as a deduction in determing the net estate subject to a succession or estate tax. This rule may be said to be supported by all of the cases cited in the present annotation. The rule being universally recognized, it remains only to discuss such questions as arise out of its application in particular cases, such as questions relating to the computation of the commissions, the particular kind of commissions included within the rule, etc. . ."

If there were any question as to the soundness of this conclusion, and we think there is none, all doubts would be resolved by the provisions of Article 14.09 above quoted. In expressly providing that in those instances in which a testator bequeathed or devised to his executor or trustee property in lieu of a commission only the value of such property in excess of reasonable compensation would be subject to an inheritance tax, the Legislature, by implication, has recognized that in other cases such commissions will be deducted before computing the inheritance taxes due the State. See cases cited in 92 A.L.R., supra, 549.

We pass now to a consideration of whether your department has been correct in disallowing commissions claimed by an executor or administrator when the executor or administrator was the sole legatee or heir of an estate. We have concluded that the fact that an executor or an administrator is the sole beneficiary or heir does not, of itself, constitute a reason

for refusing to allow a deduction for commissions. In such cases, the commissions are allowed as compensation for services rendered and are received as such, rather than as a devise or bequest or an inheritance from the decedent.

Numerous problems may arise in connection with the allowance of an executor's or administrator's commissions as deductions. Although you have not specifically requested our opinion as to these problems, we think that we should call a few of them to your attention since, although the result we have reached may be said to be the general rule and that usually the full amount of such commissions are deductibile, this rule cannot be universally applied. For example, since in Texas the entire community estate is liable for the debts of the husband and is subject to administration by his executor, the amount of commissions which may be deducted will vary with the facts of each case. Another case presenting special problems would be that in which the debts and expenses exceed the probate estate as, for example, where the decedent has exercised a power of appointment or made a transfer in trust reserving a life interest, or made a transfer in contemplation of death. Special deduction problems might arise in those cases in which Texas is the domiciliary state but administration expenses are incurred, not only in connection with the Texas estate, but also in connection with assets located and administered in another state or states.

The foregoing examples do not encompass all the possible situations in which the general rule as to the deductibility of the commissions of an executor or an administrator would not be followed. We mention them as an example of the questions which may arise in the administration of our inheritance tax statutes. If and when such questions do arise, you may properly request an opinion of this office on the particular fact situation involved.

S U M M A R Y

The general rule is that the commissions of an executor or an administrator should be allowed as a deduction in computing the inheritance taxes due the State even if the executor or administrator is the sole heir or legatee; however, this general rule is subject to qualification under various fact situations.

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APPROVED:
OPINION COMMITTEE:
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Yours very truly,

WILL WILSON
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REVIEWED FOR THE ATTORNEY GENERAL
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